Supreme Court, U.S.
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No. 99 382

IN THE
Supreme Court of the United States

LUCIAN HUNTER HAY

Petitioner,

vs.

ALAN LAZAROFF, WARDEN
Orient Correctional Institution
Orient, Ohio and
The Attorney General of Kentucky,
Ben Chandler, Frankfort, Ky.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Petitioner's conviction and subsequent agreement not to appeal his conviction are unconstitutional and therefore in violation of due process of law when the conviction was obtained by the suborning of perjured testimony by the State, known use of fabricated evidence, and knowingly withholding of exculpatory and impeachable evidence.

2. Whether the agreement not to appeal was coerced by threats and faulty legal advice by trial counsel in violation of the Petitioner's 5th, 6th, and 14th amendment rights.

3. Whether the Courts below have failed to follow this high courts orders in cases such as the Petitioner's where the agreement has been breached by the State when they failed to conduct an evidentiary hearing and grant relief to the Petitioner because of the breach.

4. Whether the Petitioner's conviction and agreement are unconstitutional and therefore in violation of due process of law when he was tried before a trial judge who had a personal bias against the Petitioner and that refused two requests to recuse himself:

   a. Refused to grant new counsel a continuance so he could properly prepare for a trial where Petitioner was facing life in prison.

   b. The trial court, because of his bias, manipulated the jury by rolling his eyes and shaking his head in disbelief whenever the Petitioner and defense witnesses would testify.

c. That the trial court refused to allow the Petitioner to withdraw from the coerced agreement but allowed the special prosecutor to continue to breach the agreement.

5. Whether Petitioner was provided with adequate assistance of counsel both at trial and at sentencing where:

a. Counsel failed to inform Petitioner he was suffering from mental illness, that lead to numerous errors by trial counsel.

b. Came to trial under the influence of alcohol.

c. Counsel failed to impeach prosecution witnesses with previous inconsistent statements.

d. Counsel coerced the Petitioner into the agreement to waive his appeal rights with threats and faulty legal advice.

e. Trial counsel threatened to withdraw if Petitioner did not accept the agreement robbing it of it's voluntariness.

6. Whether Petitioner was denied his due process rights to a fair trial by the cumulative effects of the errors depriving him of his fourteenth amendment rights to the United States Constitution.

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Petitioner Lucian Hunter Hay, Pro Se, respectfully requests that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The order of the Sixth Circuit Court of Appeals denying to issue a Certificate of Appealability is attached as Appendix A. The United States District Court for the Eastern District of Kentucky dismissal of Petition for a Writ of Habeas Corpus is attached as Appendix C. The order of the Supreme Court of Kentucky denying discretionary review is attached as Appendix D. Order of the Court of Appeals of Kentucky denying Petitioner's Pro Se motion for rehearing is attached as Appendix F. Order of the Court of Appeals denying to hear Petitioner's direct appeal is attached as Appendix H.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on June 12, 1999. The Petition for Certiorari is filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part as follows:
No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury...nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty without due process. U.S. Const. Am. V.

The Sixth Amendment to the United States Constitution provides in pertinent part as follows: In all criminal prosecutions,

the accused shall enjoy the right to a speedy trial...and to have assistance of counsel for his defense.
U.S. Const. Am VI.

The Fourteenth Amendment to the United States Constitution provides in pertinent part as follows:
...nor shall any State deprive any person of life, liberty or property, without due process of law. U.S. Const. Am. XIV.

STATEMENT OF THE CASE

History of the case:

This case was the result of a complex scheme to remove Petitioner from my elective office as the Jailer of Franklin County, Kentucky. It started when Evin Evins and his civil attorney recruited a small group of disgruntled employees and schemed together for their own political and financial gain. The plan devised by attorney Smith was to file a civil suit and bolster it by bringing criminal charges against the Petitioner, or as stated by Attorney Smith in a phone call to Evins (recorded by Evins), "The main thing is to remove Hay from office." Their plan would falter when after Attorney Smith and his client, Evins, contacted the FBI and they failed to find any criminal activity (as stated in an early FBI case report). Smith then directed Evins and Jennifer Vest to recruit County Judge Executive, Bob Arnold, into their scheme and have him request an investigation. All three met at a county park in a clandestine meeting. This meeting was secretly recorded by Evins, as he was wearing a hidden microphone and recorder. [This audio tape that recorded these three plotting to frame the Petitioner was withheld by both the State and the FBI and not discovered until six months after this conviction.] Bob Arnold was and still is an extremely powerful politician because of his close personal and political relationship with then Lieutenant Governor, Paul Patton, who was running for Governor of Kentucky. Patton is now Governor of Kentucky. Arnold would gladly join in on their scheme, as the Petitioner was supporting Patton's opponent,

republican, Larry Forgy. The reason this tape recorded meeting was withheld was because Arnold agrees to lie to investigators, commit perjury, and use the power and prestige of his office to frame the Petitioner. Arnold stated that he would also contact the Department of Corrections and have them start a bogus investigation of the Petitioner and his operation of the Franklin County Regional Jail. This was done to promote the public impression that there was something seriously wrong with the Petitioner's operation, thus, following the plan, Arnold had inmate housing contracts canceled to bring about a serious financial hardship on my administration increasing public dissension in an effort to force my resignation from office.

The Criminal Investigation:

The investigation of the Petitioner that lead to this conviction was conducted by the Kentucky State Police Special Investigations Unit, who were all close personal friends of complaining witness Jennifer Vest's live in lover, State Trooper Gerald Wilson. As soon as the Petitioner was indicted, Wilson was promoted to work in the very same office of Special Investigations with his friend who conducted the investigation. The Special Investigation Unit is known in the law enforcement circles as the "Dirty Tricks Unit" of the Kentucky State Police. The investigation truly revealed the charges were fabricated and that Vest and others had lied to the investigators, as well as the FBI. But because the investigation was conducted and manipulated by the best friends of the complaining witness and the extreme political influence exerted by County Judge Executive, Bob Arnold the "FACTS" didn't matter and the evidence that the Petitioner was indeed innocent and was being framed was covered up and withheld form the defense and the jury.

Indictments and Trials:

The scheme broke into two avenues. One scheme involved a shotgun approach by the Specially Appointed Prosecutor, (because

of my friendship with the local prosecutor), charging the Petitioner with everything from giving staff time off for finding dangerous contraband to rape. The other avenue was to charge the Petitioner in Federal Court with four counts of Obstruction of Justice. The same group of disgruntled employees alleged that I forced them to sign false affidavits in a Federal lawsuit filed by an inmate. As the investigation continued, just about any witness that supported the Petitioner had an investigation launched against them or actually had bogus charges brought against them, courtesy of the "Dirty Tricks Unit". This of course, was used to either discredit the witness or to intimidate them from testifying.

In the first State trial, I was found not guilty on all seven felony counts brought against me, including 2 counts of intimidating a witness (contrary to what the state continually presents to the courts below). The next trial for the Petitioner was on the four counts of Obstruction of Justice in Federal Court. We were able to prove that these same disgruntled employees has schemed to fabricate the charges against the Petitioner. One of the witnesses, Tracy Frye Hopper, testified that she witnessed the incident in question, but we were able to prove with her timesheet that she wasn't even at the Jail that day, as she had told the FBI that she was. Several other witnesses were also caught committing perjury, thus, the Petitioner was found innocent. Just after being found innocent in the Federal Trial, my attorney demanded $60,000 more than the agreed price to represent me in the upcoming second State trial, which are the charges at bar. Unable to meet this $60,000 increase, he withdrew and I was forced to retain new counsel just thirty days before trial where I was facing life in prison. New counsel immediately requested a continuance of sixty to ninety days so he could properly prepare. Special Judge Shewmaker, who had been appointed to hear the case because both Franklin County Circuit Judges recused themselves because of their friendship with the Petitioner, refused to grant the Motion and a heated argument

ensued, which lead to trial counsel to make two separate requests to Special Judge Shewmaker to recuse himself because of the personal bias he had demonstrated. Both of which he refused.

The Petitioner was convicted in that jury trial of the crimes of rape, sodomy and sexual assault. In a sham of a trial that was riddled with perjured testimony, fabrication of evidence and the withholding of exculpatory and impeachable evidence and the overpowering of the Jury the Trial Court. After the guilt phase, but prior to the sentencing phase, trial counsel approached the Prosecution, unbeknownst to the Petitioner, with an offer of a 10 year maximum sentence if the Petitioner would waive his appeal rights. The offer also included: the reduction of a fabricated felony charge against the Petitioner's wife to a misdemeanor. The dropping of appeal of the dismissal of trumped up felony theft charges, charges that were dismissed by Special Judge Jennings. The Petitioner refused the deal offered by his counsel, stating he wanted to appeal. Stating that the complaining witnesses had committed perjury to get the conviction and I could prove it on appeal. Trial counsel made several threats, one being that he would withdraw and Petitioner would have to go through the Sentencing Phase by himself if he didn't take the deal. He also stated that, "You know this Judge has it in for you and even if you do get an appeal, you will be tried before him again and he will make sure you are convicted just like he did this time and he will make sure your wife is convicted too and you all will lose your children." Counsel stated that if, "You don't take the deal right now, the deal was off and I will withdraw and you will have to go out there by yourself." The Petitioner had only a very few minutes to make his decision. The deal was hesitantly accepted. At the plea canopy, the Prosecutor even added that none of the alleged victims would oppose parole when the Petitioner was eligible (something the Petitioner is sure they will breach, as the Commonwealth adding to the list of breaches by the State). But within 48 hours I notified counsel that I wanted to withdraw from the agreement. I also sent a letter to Special Judge Shewmaker informing him that my attorney would be filing a motion to withdraw from the agreement

and that he would also file a 60.02 motion for a new trial because of the gross prosecutorial misconduct of obtaining the conviction with known perjured testimony. Attorney, Max Smith, refused to file either motion. I finally ordered him to file it or I would file it myself. Trial counsel finally filed the motion to withdraw from the agreement two weeks later. This was still several weeks before sentencing. However, he still refused to file the 60.02 motion, so the Petitioner filed, as best he could, a Pro Se 60.02 motion to the trial court asking that the conviction be set aside because of Prosecutor misconduct. Petitioner claimed that the Prosecutor knowingly presented and argued known perjured testimony and knowingly withheld exculpatory and impeachable evidence. At sentencing on October 13, 1995, the trial court refused to entertain the 60.02 motion stating that the Petitioner had given up the right to file said motion in his agreement and then refused to allow the Petitioner to withdraw from the agreement stating that it was a "good deal for everybody" even after the Petitioner rose to argue that there should be some kind of a hearing and arguing that the agreement was improper and he should not be held to it. The court held him to it and sentenced the Petitioner to 10 years. But would then allow the prosecution to prosecute the Petitioner's wife in violation of the agreement, which by every law in the land, voids the agreement, but the Petitioner was still held to the agreement. The Prosecution also failed to drop his appeal of the dismissal of the trumped up felony theft charges and those charges have now been reinstated by the Kentucky Court of Appeals. Even with these two major breaches of the agreement by the Prosecution, the Courts below have held the Petitioner to the unconstitutional agreement and not allowed him to appeal and present his evidence of his innocence and his overwhelming evidence of prosecutor misconduct, judicial bias and ineffective assistance of trial counsel that lead to his unconstitutional conviction and his unconstitutional incarceration, but have allowed the Prosecution to blatantly breach the agreement which is in direct conflict with those courts prior rulings in such cases and in direct conflict with this high court's rulings that breaches such as these are a just cause for the issuance

of a Writ of Habeas Corpus because it violates the Petitioner's rights under the 14th amendment to the United States Constitution. See Blackledge v. Allison 97 S.Ct. 1621, 1603 and Santabillo v. New York 92 S.Ct. 495.

Appeals:

The Petitioner filed a timely notice of appeal to the Court of Appeals of Kentucky. Counsel was appointed, but he failed to appeal the trial court's ruling not allowing the Petitioner to withdraw from the agreement because it was not knowingly, voluntarily and intelligently entered into and that the prosecutor was breaching the agreement and the conviction was obtained by the unconstitutional misconduct by the prosecutor even after several written requests by the Petitioner to do so. The Court of Appeals dismissed the appeal based on a motion by the State Attorney's General Office citing the terms of the agreement not to appeal. Appellant counsel did not respond as he should have, stating that the agreement had been breached by the Special Prosecutor and therefore void. The Petitioner was notified of the dismissal by appointed appellant counsel and "that by Kentucky Law this terminated his involvement in the case." Petitioner then filed a Pro Se motion for rehearing to the Court of Appeals citing the ineffectiveness of appellant counsel and argued that the agreement was not knowingly, voluntarily, and intelligently entered into and that the agreement had been breached by the Prosecution and cited Santabillo v. New York 92 S.Ct. 495. The appellant court failed to conduct an evidentiary hearing as required by their own rules and court decisions, see Weatherford v. Commonwealth 703 SW 2d 882 (Ky. 1986). The court of appeals denied the motion for a rehearing on January 17, 1997. The Petitioner then filed a timely motion for discretionary review to the Supreme Court of Kentucky, citing ineffective assistance of appellant counsel as well as all the other issues raised to the courts below. Petitioner's motion was denied on June 12, 1997. The Petitioner then timely filed his petition for a Writ of Habeas Corpus to the United States

District Court for the Eastern District of Kentucky in Frankfort, Kentucky citing the ineffectiveness of his appellant counsel, as well as the breach of the agreement and all the issues raised in the state courts. The court denied the petition again citing the agreement, as a procedural bar to appeal, and that trial counsels actions in negotiating the agreement were not ineffective as it was a good deal. The court never addressed the breach of the agreement by the special prosecutor voiding the agreement or his threats and coercion when the Petitioner filed for Certificate of Appealability citing the failure of the District Court to hold an evidentiary hearing on the breach of the agreement. The District Court, addressing the breach for the first time stated that the Petitioner had presented the breach to the state courts and their decision not to hear the claim is determinative. The Petitioner filed a timely appeal to the Sixth Circuit Court of Appeals citing that while the Petitioner did state he presented the breach of the agreement to the state courts to show exhaustion of his claims. They never conducted a hearing on the breach, just simply choosing to ignore the claim. The Sixth Circuit refused to issue a Certificate of Appealability, thus upholding the U.S. District Courts ruling.

REASONS FOR GRANTING OF WRIT

Petitioner, Lucian Hunter Hay, was denied due process of law when he had bogus investigation launched against him which was conducted by close personal friends of the complaining witnesses. This lead to a sham of a trial that was grossly in violation of his due process rights when he was convicted by the known use of perjured testimony and then arguing the known perjured testimony for the jury to consider, the solicitation of perjured testimony by the special prosecutor from witness Rodney Brooks, knowingly withholding of exculpatory and impeachable evidence. Petitioners due process rights were also violated when he was tried before a judge who had a personal bias against the Petitioner and refused two (2) requests to recuse himself. That his trial counsel was ineffective both at trial and that of his actions in

coercing the Petitioner to waive his appeal rights. That his due process rights have been further violated by the prosecution breaching the agreement while the Petitioner has been held to the agreement and not allowed to appeal his conviction, leaving him to languish in prison. On every point the courts have ruled that these type of violations warrant a new trial or that a Writ of Habeas Corpus be issued.

Pyle v. State of Kansas 63 S.Ct. 177, if imprisonment resulted from perjured testimony knowingly used by the state prosecutor to obtain the conviction and from deliberate suppression by the same authorities of evidence favorable to Petitioner, it violates his constitutional rights and he is entitled to be released form his present custody. Bracy v. Gramley 117 S.Ct. 1793 (1991), Petitioner has the right to a trial before a judge with no actual bias against the Defendant. Hill v. Lockhart, 106 S.Ct. 366, pleas are not made knowingly or voluntary where it was inducted by counsel's faulty legal advice and Heiser v. Ryan, 951 F.2d 559, plea not voluntary if attorney threatens to withdraw if Defendant did not take plea. Blackledge v. Allison, 97 S.Ct. 1621, "The law is clear, an unkempt plea bargain is a valid basis for the issuance of a Writ of Habeas Corpus."

A. Petitioner's Agreement to waive his appeal rights was involuntary and therefore in violation of due process of law due to the coercion and faulty legal advice of trial counsel or in the alternative the agreement has been breached by the state removing any procedural bar to appeal.

Before this court will entertain his petition, the Petitioner recognizes he must over come the procedural bar to appeal. The facts that the bar never truly existed or has been removed are fairly straightforward. The Petitioner wanted to appeal his case after his conviction, which was obtained by the known use of perjured testimony by the state. Because of this fact, a reversal was virtually automatic when the Prosecutor knowingly introduces perjured testimony, as stated in U.S. v. Wallach, 935 F.2d 445 (2nd Cir.

1991); also see Napue v. People of the State of Illinois, 79 S.Ct. 1173, and Miller v. Pate, 87 S.Ct. 785 (1967). But because of trial counsel's faulty legal advice that, "The Judge has it in for you and even if you get your appeal you will get the same judge and he will make sure you are convicted again just like he did this time." (Sworn affidavits from witnesses of this conversation were presented to the U.S. District Court). Trial counsel was saying it didn't matter about the perjured testimony or the fabricated evidence, I was never going to get a fair trial because Judge Shewmaker would manipulate and overpower the jury to insure a conviction. This is below the standard set for attorneys in Stricklan v. Washington 104 S.Ct. 2052 (1984) and Hill v. Lockhart 106 S.Ct. 336, "If not for counsel's faulty legal advice, defendant would have insisted on going to trial," or in the Petitioner's case, insisted on appealing his conviction. The Petitioner continued to insist on appealing, which lead to a very heated argument between the Petitioner and trial counsel. This ultimately lead to the threat by counsel that if the Petitioner didn't take the deal he would withdraw and he would have to go through the sentencing phase by himself. The Petitioner having already had his first attorney walk out on him because he wanted more money, just before this trial, was now faced with the loss of second counsel who he and his wife had paid with every penny they could borrow from banks, relatives and friends. He also threatened the Petitioner by saying that Judge Shewmaker would make sure his wife would also be convicted on her trumped up charges and go to prison and we would lose our children. Because of his coercion and faulty legal advice, I felt I was left no other choice but to accept the deal not only because I would never get a fair trial, but to protect my wife from a trial before a corrupt judge and prosecutor. This coercion and faulty legal advice robbed the agreement of its voluntariness. Heiser v. Ryan 951 F.2d 559, "Plea agreements not voluntary where defense counsel threatens to withdraw if defendant did not take the agreement." (The Petitioner provided the District Court with affidavits of witnesses to this threat). The agreement was not voluntary and should have never stood as a bar from appeal. As

this court held in Fontaine v. United States 411 U.S. 231 (1973), "A defendant's acknowledgment of voluntariness at his plea proceeding cannot be utilized on review as conclusive proof that the plea was in fact voluntary. In Miller v. Angliker 848 F.2d 1312 (2nd Cir) Cert denied448 U.S. 890 (1988). The court ruled that guilty plea which is knowingly and intelligently entered into may be vulnerable to challenge if it was entered without knowledge of material evidence withheld by the prosecution. The Brady Doctrine would also apply to guilty pleas when the plea is affected by the governments non-disclosure of evidence . See Brady v. Maryland 83 S.Ct. 1194. Had the special prosecutor not withheld the audio tape recordings, that were taped by complaining witness Evin Evins of Bob Arnold, Jennifer Vest and Evins plotting to frame the Petitioner and the tape recording of Vest and Evins saying they were being paid for their testimony, the Petitioner would have been found innocent, as he has always claimed that he is. So the material evidence that was withheld would have changed the outcome of the trial and eliminated the agreement, thus a Brady violation occurred robbing the agreement of its voluntariness and thus is void.

Agreement is void because of Breach by the State

For the sake of argument, if the agreement was entered into knowingly, intelligently and voluntarily, it has been breached by the state not once but twice while the Petitioner has been held to the agreement and not been allowed to have his appeal heard. The prosecutor stated to the local news paper that he would prosecute the Petitioner's wife in violation of the agreement and made good on that statement when she was convicted on August 25, 1997. She was given five years probation and ordered by Judge Shewmaker, in a very vicious and unconstitutional decision, not to have any contact with the Petitioner, her husband of fifteen years (15) or he would put her in prison. Her conviction that was manipulated by Judge Shewmaker once again overpowering of the jury, was overturned on appeal with one judge stating there was no evidence whatsoever that she had done anything wrong. The

prosecutor was also required under the agreement to drop his appeal of Special Judge Jennings dismissal of alleged theft charges against my wife and I. These charges are nothing sinister, but created out of the clear blue. The Petitioner used the profits from the vending machine for the employee benefit fund just as everyone in County, City and State government does. But in order to create charges, the police and special prosecutor said I should have turned that money over to the county, even though no other department head or elected official was required to do and no one has been required since. Just created charges to paint the picture that the Petitioner and his wife are thieves. The special prosecutor did not dismiss his appeal and those charges have been reinstated by the state courts. This court has ruled in Blackledge v. Allison 97 S.Ct. 1621, 1630: "The law is clear that an unkempt plea agreement is a valid basis for the issuance of a Writ of Habeas Corpus." This court has continually ruled that breaches of plea agreements voids the agreement and the defendant is entitled to relief. See Santabello v. New York 92 S.Ct. 495 and Mabry v. Johnson 104 S.Ct. 2543. The Petitioner presented to the courts below that the state had breached the agreement. Petitioner provided the courts with a copy of the transcript of the agreement and the court records of the prosecution of my wife and the court order reinstating the charges that the prosecution was supposed to dismiss. It is clear that there has been a major breach of the agreement which voided the agreement from the very beginning. But the courts below have ignored this courts rulings in such cases which are to be "the law of the land." They have also violated their own rulings in such cases: Workman v. Commonwealth 580 SW 2d 206 and Peavy v. United States 31 F.3d 1341 (6th Cir. 1994), "Breach of agreement entitles defendant to relief." Petitioner can only wonder what would make the courts below ignore this court's rulings as well as their own. Is it that the "ends justify the means?" If that is the case, courts have ruled that, that is "wholly contrary to the law." U.S. v. Helmandollar 852 F.2d 498, 501. Is it the Petitioner's P.S.I. that I am told the court looks at that has them accepting the "end justifies the means," a P.S.I. report that paints the Petitioner as one of the

most heinous individuals in history. A report that was written totally from information from the same detectives from the "dirty tricks" unit of special investigations, that were close personal friends with the complaining witnesses. It was compiled with lies on top of lies and this was told to the sentencing court when the Petitioner read it. If the Petitioner was so heinous, why only a 10 year sentence and no opposing of parole? The Petitioner is an innocent man who was a thorn in the side of Corrections and the blue ribbon panel consisting of representatives from the Kentucky Supreme Court, the Justice Cabinet, and several other cabinets because of the Petitioner's testimony before the Kentucky General Assembly that resulted in several major pieces of legislation sponsored and written by this blue ribbon panel being defeated costing the state of Kentucky millions in federal grant money. Prompting threats of retaliation by the Secretary of Justice. Four months later this investigation was launched by the "dirty tricks" unit of the Kentucky State Police who are under Justice. All the power of the State including the state judiciary was brought to bear on the Petitioner in retaliation for his exercising of his first amendment right to speak out on issues of public concern. The powers of the state have sent a clear message to other low level politicians not to oppose their legislation or face the same fate as the Petitioner. To be blatantly indicted and convicted with perjured and fabricated evidence and have all of your appeals dismissed in total disregard for the law and their own case rulings. Only to have the Chief Justice of the Kentucky Supreme Court, who ruled on the Petitioner's case retire from the bench and accept the Cabinet Secretary position over Justice with the very administration that framed the Petitioner.

The Petitioner is innocent. The powers of the state have done everything to block the truth from coming out about how he was framed. This court should hear the Petitioner's case so that an innocent man may be released from his unconstitutional incarceration.

B. Petitioner was denied due process of law when his conviction was obtained by the known use of perjured testimony and the withholding of exculpatory and impeachable evidence by the state.

The prosecutor knowingly used perjured testimony to convict Petitioner. The entire trial was based on believable testimony, as there was no physical evidence by the plaintiffs and witnesses. Plaintiff Donna Yeast Graham stated she was raped by the Petitioner seven (7) years earlier when she was the Director of Inmate Services at the Franklin County Regional Jail, but never told anyone. She stated she didn't tell anyone because she was threatened by Petitioner that if she told anyone, Petitioner would have her children taken away from her. This, of course, was a lie to cover up her never ever disclosing this horrible event to one living soul, because it never happened. Court records show that she was having a "jail house love affair" with inmate William "Bo" Morrison at the time she says Petitioner allegedly raped her. Judge Shewmaker, the sitting Judge, in this case was also found to be the presiding judge in her divorce years earlier. Judge Shewmaker took her two small children from her because of the physical and verbal abuse of her children from Bo Morrison and not because of any threats by the Petitioner. The Prosecutor and Judge knew of the documents long before the defense discovered it just days before trial. Judge Shewmaker withheld from the defense that he had presided in Yeast/Graham divorce. In addition to this, the court records reveal that within a short time after the alleged rape that Plaintiff Donna Yeast Graham alleged took place, she used her position as the jail's administration officer to have inmate Bo Morrison released on a Christmas furlough so that she (according to court documents) could meet with him in a hotel room in Frankfort, Kentucky on Christmas morning leaving her two small children to celebrate Christmas without their mother (again, according to court documents). Judge Shewmaker refused to allow this document into evidence. This went directly to the credibility of the existence of the rape, the time frame and her allegation of her

not reporting to anyone because of the alleged threat by the Petitioner to have her children taken away. This refutes the prosecutor's whole case and proves that Graham, the police and special prosecutor knowingly fabricated the entire rape scenario to frame the Petitioner.

The special prosecutor would attempt to have a prosecution witness commit perjury in order to bolster his known fabricated charges of rape. Just before Rodney Brooks was to testify for the prosecution. Special prosecutor Guttman demanded Brooks testify that Plaintiff Donna Yeast Graham had told him seven years ago that Petitioner raped her. Brooks refused, saying it was a lie, she never told him that. Prosecutor Guttman would say, "I know that, but I want you to testify to that anyway." Brooks would refuse again. Plaintiff Donna Yeast Graham and witness Evin Evins then asked him to commit perjury by testifying that she had told him when she knew she had not. He refused. While Brooks refused to testify to this, it clearly shows the overall pattern and "mind set" of the "business as usual" of the prosecutor knowingly suborning perjury and fabricating evidence. Mr. Brooks told the Petitioner's brother and the Petitioner about the prosecutor, Graham and Evins attempting to have him commit perjury. We presented this to trial counsel, but the trial counsel refused to inform the Judge, stating that "the Judge was mad enough at him and he didn't want to make him any madder." This was so critical to the Petitioner's case because it went right to the heart of the case that it was all based on lies and that the prosecution was fabricating more as the case went on. This one action would have changed the outcome of the trial had the trial counsel presented this to the judge and jury, but he refused and the Petitioner was prejudiced by his actions.

Plaintiff Jenny Bryant Wilson's case against the Petitioner with 20 counts of rape over a two year period, but half way through that period she would ask the Petitioner, who was allegedly raping her to **"hire her sister"** Vicky Hulette. (No one would ask their rapist to hire their sister). She stated the rapes continued, but never told her sister, Vicky Hulette. She states she couldn't take it anymore and quit her job. She went to work for a part time

agency. When laid off from that job she filed for unemployment, but could not collect from the part time employer. She then filed against the Franklin County Regional Jail, citing sexual harassment and stress as the reason she resigned her job. On May 18, 1992 she signed a sworn statement at her unemployment hearing that she had no problems with staff or supervisors and the sexual harassment was from inmates. She was denied her unemployment. Ms. Bryant appealed. At her appeal hearing on June 17, 1992, she again testified under oath, on tape, that the harassment was by inmates, not staff. She then went on to state that a juvenile inmate had threatened to rape her. This was proven true by her incident report of the threat before she quit. She was denied again. Her sister Vicky Hulette quit her job approximately two (2) weeks later.

A month later, after being denied her unemployment, Ms. Bryant would call the jail and ask employee, Ted Hammermeister, to ask Petitioner to give her and her sister, Vicky Hulette their jobs back (this was transmitted to the Petitioner in a memo). Ms. Bryant would come back to work for Petitioner, the very same man that she was now claiming raped her, at the Jail in August, 1992. No one would do that if they were being raped. She would later quit to go to work at the Jim Beam Distillery.

In the ensuing investigation by Kentucky State Police Special Investigations, both Ms. Bryant and her sister Ms. Hulette would state to investigators that after her first unemployment hearing in May, 1992, but before the second unemployment hearing June, Petitioner would threaten Ms. Hulette to tell her sister, Ms. Bryant, that if she didn't back off on saying Petitioner sexually harassed her, he would make sure she lost her child (again, the same kind of threat used by Plaintiff Donna Yeast Graham to justify her silence. They both state to investigators that Ms. Bryant was so scared that she didn't even go to the second hearing of June 17, 1992, but official state records show she **did go** and the investigators knew it, as they had seized all personnel files from the jail with a search warrant and these records **were in her file.** She states this is why she never told anyone. Clearly, they lied to the

Kentucky State Police, but the police did not care, as they were out to frame the Petitioner for political reasons.

At trial, trial counsel provided the prosecutor the documents we had received from the Cabinet for Human Resources that show that Ms. Bryant signed a sworn statement on May 18, 1992, that clearly shows she had no problems with Supervisors and she did go to the second unemployment hearing that she and her sister had lied to investigators by saying that she didn't go too. These documents clearly destroyed the prosecutor's case of fear of the Petitioner that the Plaintiffs said they had, which is a critical element of the crime of rape by forcible compulsion. Prosecutor Guttman would put Jenny Bryant Wilson, Vicky Hulette and Tracy Frye Hopper on the stand, have them change their stories that they had told State Police the alleged threat to Ms. Hulette that they said happened in June of 1992, now didn't happen in June of 1992 but in May, 1992 before her first unemployment hearing stating that is now why she signed the sworn statement saying she had no problems with staff or supervisors. She was afraid. This was critical, as by her sworn statement in her unemployment hearing and actions would prove that their whole case was a sham, built on one lie after another with the help of the State Police and prosecutor. Because of the lack of time to prepare because of the trial judge's refusal to grant new counsel a continuance and the deliberate fast pace of the trial, it was nearly impossible to come up with impeachable evidence of the now changed story. I had my secretary check the courthouse records for the timesheets of Ms. Hulette to see if she was working that day in May, the day prosecutor Guttman had the three testify that was the day of the threat. We had to get the copy of the timesheets from the courthouse, as the State Police had seized all of our timesheets in a search warrant in September, 1994. The timesheet from the courthouse clearly showed that Ms. Hulette was on vacation the day that Prosecutor Guttman had the three testify that she was threatened. Clearly proving they had all lied conspired to commit perjury and Prosecutor Guttman suborned it because he had in his possession the original timesheet that clearly showed her on vacation. This is the same motive used in the federal trial. In both

cases, the timesheets showed they lied but no one cares because they were all out to frame the Petitioner. Rather than finally admitting the fabricated case and the known use of perjured testimony, the prosecutor then put Ms. Hulette back on the stand as a rebuttal witness. He showed her the timesheet and said, "you did work that day didn't you?" She stated, "yes," I came in at 7:00 a.m. and Mr. Hay threatened me and I left by 7:30 a.m." The prosecutor would contend the timesheet was filled out wrong by Ms. Hulette's supervisor, none other than Plaintiff, Tracy Frye Hopper. During the jury's deliberations, they returned to the courtroom about Ms. Hulette's testimony, clearly one or maybe more of the jury had concerns about the credibility of the testimony. The court refused to answer their questions. Again, credibility was an issue and the believability of the testimony was the entire case. Had the prosecution stood up and admitted the perjured testimony, as is required by law, I would have been found innocent, but I was convicted. The prosecutor knowingly allowed this known perjured testimony and false evidence to go to the jury after he argued the known false evidence. Brown v. Wainwright 785 F.2d 1457, "the government not only permitted false testimony of one of its witnesses to go to the Jury, but argued it as a relevant matter for the Jury to consider. If false evidence used, conviction and or sentence is unconstitutional and clearly VOID." Brown v. Borg 951 F.2d 1011, 1071 citing U.S. v. Bagley 105 S.Ct 3375, "Prosecutor knowingly introduced and argued false evidence, thus the conviction must be overturned." Also see, U.S. vs. Wallach 935 F.2d 445 (2nd Cir. 1991). Within a few days of the conviction, the Supervisor's Logs for May of 1992 were found at the jail. It was prepared by Tracy Frye Hopper, Ms. Hulette's supervisor on the days in question. These records clearly show: 1). Ms. Hulette was on vacation May 18, 1992 as stated by the Defense and proven by the timesheet. 2). It proves that the Prosecutor conspired to have Ms. Bryant, Ms. Hulette and Ms. Frye-Hopper all commit perjury of this material fact, proving the whole case was a sham, because the prosecutor had other documents in his possession that prove they had all committed perjury and he suborned it. 3). It

proved that had Ms. Hulette been working in May, as they all testified she was, she would have been on the **night shift and not working 7:00 a.m. to 7:00 p.m. day shift as she claimed!!!** As Special Judge Shewmaker said when he refused to grant a continuance to new counsel, "there is nothing to prepare for, it's a basic swearing contest between the alleged perpetrator and the alleged victims." With what little time the Defense had, we were able to prove these people conspired to commit perjury, only to have the Prosecutor have them change their stories and commit more outrageous perjury. Had he not done this, I would have been found innocent. Mooney v. Holohan, 294 U.S. 103 (1935). Special Prosecutor Guttman would continue to cover this up. At a bond hearing for the Petitioner, in September, 1995, when shown the Supervisor's Logs that showed Bryant, Frye and Hulette lied and he knew it, he stated had done nothing wrong and he proved she worked that day. We demanded he produce the Employee Break Logs that he had in his possession that also prove they all lied and he knew it. He refused to turn them over. U.S. v. Jackson 780 F.2d 1305, 1311 (7th Cir.1986) [Government's bad faith attempt to suppress evidence indicates that such evidence may be material]. Clearly, he is conspiring with the Plaintiffs and State Police to obstruct justice. To this day, the special prosecutor and the State Attorney General (who the Petitioner also demanded to turn over the documents) refuse to turn over the break logs in a continued effort to cover up the truth in this case. Special Judge Shewmaker also refused to order the break logs turned over to Petitioner. The Petitioner filed a Writ of Mandamus to force Judge Shoemaker to order the State Police and the prosecutor to turn over the break logs. Special Judge Shewmaker filed a response to the Higher Court asking them to deny the motion, which they did. He was not interested in justice as a truly impartial judge should, but is truly interested in further covering up the wrongdoing of the Commonwealth and insuring an innocent man stays in prison. Prosecutor Guttman did not stop there. Before my sentencing on October 13, 1995, I filed a Pro Se CR 60.02 motion citing newly discovered evidence and prosecutor misconduct of knowingly

having these people conspire to commit perjury and conspiring to withhold evidence. The Prosecutor would not step forward as required and admit the fabricated case. Brown v. Wainwright 785 F.2d 1457, [Government required by statutory and constitutional law to step forward and disclose known perjured testimony]. He refused to turn over the Employee Break Logs that prove beyond any doubt that he suborned perjured testimony and that he knowingly argued false evidence and clearly is withholding exculpatory evidence Judge Shewmaker would dismiss this 60.02 motion stating, "that it didn't matter, the Jury believed them and not you, besides you waived your right to file a 60.02 motion." Failing to have a hearing, then sentenced me to ten (10) years, stating "it was a good deal for everybody." Clearly, the prosecutor withheld evidence, he suborned perjury he introduced and argued known false evidence, but the trial judge said it didn't matter. A year after the trial, tape recordings surfaced of conversations between Plaintiff Jennifer Vest, Witness Evin Evins, Witness County Judge Bob Arnold and others, that clearly proves that the entire case was a sham. The case was fabricated to remove me from office. Evin Evins who tape recorded the conversations would state in his sworn deposition in the companion civil law suit [that all the plaintiffs had filed] that he gave all these tapes to the State Police and the prosecutor. The prosecutor and the State Police would conceal the existence of this exculpatory evidence from the defense, even after sweeping requests for such tape recordings. From these developments, it is clear the Commonwealth is still withholding other tape recordings that may and quite possibly do contain additional exculpatory evidence and quite possibly contain additional evidence of criminal activity by the prosecution to frame the Petitioner. Walker v. Lockhart 763 F.2d 942 -- Due process violated when State failed to disclose tape recordings despite sweeping general request and court order to disclose. These tapes confirm that this was a conspiracy cooked up by County Judge Bob Arnold, because of Petitioner's political views and his political support of other candidates.

Excerpts for the knowingly withheld tapes:
Arnold: Alright, let's talk about ways to go after him...
Vest: I'll tell you Bob, if Hunter interferes with my job I'll nail him one way or the other. **Arnold:** Well, honey, that's what you have to do. **Arnold:** I'll testify that 10 -12 came to me and complained. **Evins:** Let me come to work for you Bob, I'll keep trying to dig up stuff on Hunter for you. He doesn't even want me around there. **Arnold:** I'll tell the State Police and Corrections I trust you all implicitly.

Vest in another tape withheld: **Vest to Evins:** I'd be in this for the money and the money only because I really like my job. **Evins:** Oh, yeah, if you weren't getting paid. **Vest:** Gerald (Gerald Wilson, State Trooper) said to make sure I got a job to go to. He couldn't pay the bills if I lost my job. **Evins:** So he supports you in this? **Vest:** I guess, he was pretty quite about it.

Evins in another tape: **Evins:** <u>If I can get everybody together and get them to say the same thing.</u>

Evins to Terry Smither: Talking about former Jail Employee Louis Weber, now a Kentucky State Police Trooper; "The State Police say don't worry about Louis, he's one of them now, he'll say the right things."

Clearly, the State Police detectives of the "dirty tricks" unit felt just because Louis Weber was a Trooper now, he'd lie in their investigation. Clearly, this one statement sums up the whole attitude of the case. These people conspired to frame the Petitioner at any cost.

These tapes prove that Vest, Arnold and others knowingly committed perjury and the prosecutor and State Police knew it. These tapes prove these people conspired to fabricate the case against Petitioner and the prosecutor and State Police knew it. These tapes prove that Plaintiff Vest trumped up her charges of

attempted rape and abuse to "nail" the Petitioner, who was about to take an adverse job action against her for padding the timesheets of Evin Evins, not because of any attempted rape or abuse. (They even comment about the padding of timesheets on the tape that was withheld). These tapes prove that Vest and Evins were in this for the money, as Vest says she enjoys her job. The tape provides clear and convincing evidence that someone was paying them for their testimony. Had the defense had this tape, the outcome would have been different. Plaintiff Vest testified at trial that she never told her State Police, live in boyfriend (Trooper Gerald Wilson) that she had lived with for two (2) years before and during the investigation, anything about the allegations. The tapes prove that she lied and thus perjured herself. This withheld tape was crucial, as I could have used it to impeach her and went directly to her credibility. If she did tell him that Petitioner attempted to rape her, why didn't he report it? His best friends were the very detectives that conducted the investigation. In a surprising twist, Trooper Gerald Wilson was promoted to work with his friends in the Special Investigations Unit just after the Petitioner was indicted. The withheld tape clearly shows he was aware of the scheme to frame the Petitioner and "was pretty quite about it." Was this promotion used as payment to keep his mouth shut about the plan?

But to continue the conspiracy of perjury, before this tape surfaced, both Plaintiff Vest and her boyfriend, State Trooper Gerald Wilson, swore under oath is separate depositions, in the companion civil case, that Vest had **never** told him anything about her charges. Clearly, the withheld tapes proves they both committed perjury in furtherance of the conspiracy. They feel very comfortable with cavalierly committing perjury even in the face of the tape recordings, as they know no one will prosecute them.

On the Arnold, Vest and Evins tape withheld by the State Police and Prosecutor, County Judge Executive, Bob Arnold, agrees to fabricate the story that 10 - 12 women employees came to him and complained that they had been harassed by the Petitioner. At trial, Bob Arnold did just that. This testimony was very devastating to the defense. The tape withheld by the prosecution

clearly shows he had conspired with Evins and Vest to tell that lie to the Jury as far back as July 20, 1994 and the prosecutor and the State Police knew it, as they were in possession of the tape. Due to the limited space, not all claims of perjury are presented.

C. Petitioner was denied due process of law when his conviction resulted from ineffective assistance of Trial Counsel as a result of several factors.

Petitioner's counsel withdrew less than 60 days before trial, requiring Petitioner to find new counsel. Attorney, Max Smith, agreed to represent Petitioner, but not until $40,000 was paid in full in advance. It took nearly 30 days to obtain the fee, leaving the Petitioner and counsel less than twenty (20) total working days to prepare for trial. The trial court, when asked for a continuance for new counsel to prepare this very complicated case, chastised the Petitioner and his attorney for changing attorneys in order to drag out the case. The Court stated that, **"People in hell want ice water, too."** Trial court totally intimidated trial counsel into withdrawing his request to have Judge Shewmaker recuse himself because of the total bias shown by the Court. The trial court and prosecutor then did not decide which of the cases it would try until a week before the trial, making it impossible for counsel and Petitioner to prepare. The court stated, "This is a basic swearing contest, there is nothing to prepare for." The Petitioner was facing life in prison. Clearly, there was a great deal to prepare for! In. U.S. v. Anderson, 993 F.2d 1435 (9th Cir. 1993), "District Judge imposed unreasonable constraints on Defendant's decision making process which rendered Defendant's plea involuntary."
We now know that the trial court informed defense counsel that he would speed up the trial, that the two weeks set aside for the trial was too long, as this was not a complicated case and could be completed in a matter of days. Petitioner discovered a letter that defense counsel faxed to Judge Shewmaker and Prosecutor Guttman. The Petitioner's defense counsel wrote he had been to his doctor and he could not take the stress of a trial of such a fast

pace. Had the Petitioner known of this illness, he would have refused to go to trial with a trial counsel that was suffering from a mental illness because the Petitioner was facing life in prison. See Beasley v. U.S. 491 F.2d 687, (6th Cir. 1974) as stated in Strickland v. Washington 104 S.Ct. 2052 (1984), ["Counsel's conduct so undermined proper function of adversarial process that trial cannot be relied on as having produced a just result."]

It was clearly apparent that the Prosecutor used perjured testimony. When Petitioner would point it out to defense counsel, he would tell Petitioner to keep his mouth shut or ignore Petitioner all together, demonstrating the bazaar behavior that we now know was what counsel's doctor had concerns about. The Court and the prosecutor knew of this, but not the Petitioner and they clearly took advantage of it.

The prosecutor continually referred to the Petitioner as Dr. Jeykell and Mr. Hyde. I asked counsel if the prosecutor was allowed to call Petitioner such heinous names. He said he'd check and see. At a break in the trial, he asked my secretary to retrieve a copy of the book, Dr. Jeykell and Mr. Hyde from the local library. After reviewing the book, he said that **"Hyde was a murderer and not a rapist, so I guess he can say that."** allowing the name calling in the trial to continue, painting a picture in the jury's mind "of all things that are evil," to quote Robert Lois Stevenson of Mr. Hyde. This type of conduct by the prosecutor required reversal in Martin v. Parker 11 F.3d 613 (6th Cir. 1993) citing U.S. v. Steinkoetter 633 F.2d 719, 720-21 (6th Cir. 1980) citing Berger v.U.S. 55 v. U.S. 55 S.Ct. 629 (prosecutor may strike hard blows, but not foul ones).

Clearly, the failure to grant the continuance and extremely fast pace of the trial by the court left defense counsel totally unprepared for this complicated trial and the discovery of the faxed letter to the court and the prosecutor. Clearly, making him ineffective, violating the Petitioner's 6th amendment rights.

On the third day of the trial, counsel came to court smelling of alcohol, obviously hung over from a drinking binge from the night before because he couldn't handle the stress of the trial.

When presented with the evidence that the prosecutor and Plaintiff Donna Yeast Graham and Evin Evins attempted to have his witness Rodney Brooks commit perjury, trial counsel refused to present it to the trial court and demand a mistrial or present it to the jury for them to consider even after demands by Petitioner. It was obvious that trial counsel was totally intimidated by the court and had given up and was not functioning in the adversarial process. He would fail to call key witnesses that we had subpoenaed. He failed to call Nick Yeast, Donna Yeast Graham's husband at the time if the alleged rape. His testimony was key to her credibility and believability. He failed to use impeachment evidence of the other Plaintiffs. In Sims v. Livesay, 970 F2d 1575, 1581 (6th Cir. 1992) "Habeas Petitioners burden of establishing ineffective assistance of counsel in counsel failure to present evidence while substantial does not require that he establish his innocence or even demonstrate that counsel deficient conduct more likely than not, altered outcome of the case; he need only show that had evidence been presented to jury, verdict would have been different: USC 6th Amendment, also see U.S. v. Toney 527 F.2d 716 (6th Cir. 1975).

Any competent attorney would have called Judge Shewmaker as a witness and not let him sit on the case, as Judge Shewmaker was the presiding Judge at Plaintiff Donna Yeast Graham's divorce. A divorce prompted by her leaving her husband and children on Christmas day, 1987, to meet an inmate in a hotel room, which was just after she claimed she was raped by Petitioner. (She did not make the charge against the Petitioner until seven (7) years later). This was possible, because she used her position as a Jail Administration employee to add his name to a list of inmates who were to get Christmas furloughs ordered by the court. This amounted to a criminal offense of conspiracy to escape. The Court would not allow us to use this evidence. Once the trial was concluded and the Petitioner was found guilty on all counts, the defense counsel approached the Prosecutor with a deal, unbeknownst to the Petitioner. When the defense counsel returned, he said the prosecutor will agree to ten (10) years maximum instead of the 140 years, you resign now and he'll reduce your wife's

felony charge to a misdemeanor. I refused pleading with counsel that the entire case was fabricated and I wanted to appeal Attorney Smith yelled the following: "The judge has it in for you and you know it. He will sentence you to 140 years today and you will serve five years at least before you get your appeal, if you get one at all. When and if you get an appeal, you will get the same judge, who has it in for you and he'll make sure you are convicted again, just as he did this time."

I once again stated I wanted to appeal. Trial counsel then yelled, "You'll be in prison and the judge will make sure your wife is convicted on her charge too. Your kids won't have any parents to raise them. Is that what you want? If you don't agree to this before we go out there for sentencing, Guttman will withdraw the deal and both you and your wife will go to prison and you all will lose your kids. Take the deal or I'll withdraw and you'll have to go out there by yourself."

Counsel was making it clear that Petitioner was "railroaded" by Special Judge Shewmaker, who obviously had a personal bias against Petitioner in violation of Petitioner's constitutional rights to a fair trial before an impartial judge, which is guaranteed by the 14 amendment. The advice of defense counsel to Petitioner was to take the deal because if you get an appeal (which would take 5 years to obtain) Petitioner would set in prison the 5 years and would be tried by the same biased judge who would once again "railroad" the Petitioner. The choices given to the Petitioner were to give up because you can't and won't get a fair trial. The choices given to the Petitioner clearly show that the Petitioner's agreement not to appeal was not made voluntarily. U.S. v Frye 738 F.2d 196, valid plea must represent a voluntary and intelligent choice among the alternative courses of action open to Defendant and assistance of counsel. Also see, King v. Dutton, 17 F.3d 151 (6th Cir. 1994) totality of circumstances, including the subjective perceptions of defendant at the time of his plea agreement. Wilbright v. Smith 745 F.2d 779, the only choice given to Petitioner by his counsel is that I would never get a fair trial and based on the actions and statements by Special Judge Shewmaker, it was obvious that would

be true; true but unconstitutional. U.S. v. Carr, 80 F.3d 413 (Wyo 1996), agreement entered upon advice of counsel is invalid if plea was coerced or if advice of Defendant's counsel was not within the range of competence demanded of attorneys in a criminal case. Clearly, defense counsel's advice to give up, you can't get a fair trial, falls below that standard. Also see, Hudson v. Morgan 760 F.2d 1027. In U.S. vs. Streater 70 F.3d 1314 (D.C. Cir. 1995) "Defendant's guilty plea was not made knowingly or voluntarily where it was induced by counsel's faulty legal advice, Hill v. Lockhart 106 S.Ct. 366. Heiser v. Ryan 951 F.2d 559, "guilty plea not voluntary if attorney threatens to withdraw, if defendant did not take plea." Thus violating his rights under the 6th amendment.

Clearly, defense counsel gave faulty legal advice to Petitioner. As stated in Strickland 104 S.Ct. 2052, [the trial defense counsel has a duty to bring to bear such skill and knowledge as well render the trial and sentencing a reliable adversarial testing process.] Also see, U.S. v. Nahodil 36 F.3d 323 (3rd Cir. 1994). Any attorney who was not suffering mental illness would have never had his client waive his right to appeal after being convicted in a trial that the prosecutor obtained the conviction with known perjured testimony. Any competent attorney would know such a contrivance would and could not stand an appeal. Any competent attorney would have called Judge Shewmaker as a witness because of his material involvement in Plaintiff Donna Yeast Graham's divorce. Judge Shewmaker would have not retired the Petitioner because of his personal bias. Any competent attorney would have known that an appeal of the conviction stops the execution of the sentence [Kentucky Rules of Criminal Procedure 12.76 (2) Stay of Execution: "Imprisonment: The execution of a sentence of imprisonment shall be stayed if an appeal is taken and the defendant elects not to commence service of sentence or is admitted to bail."]

D. Petitioner was denied his due process rights and equal protection of the laws by the trial court when trial court refused to recuse himself, when it was very obvious that trial

court had a personal bias and determined before trial that Petitioner was guilty. The court then proceed to assist the prosecutor by overpowering the jury.

The Petitioner's due process rights were violated by the personal bias that the trial court showed in it's handling of this case from the very beginning to the very end. The trial courts constant intimidation of the Petitioner and his trial counsel lead to the unconstitutional conviction and the coercive atmosphere that lead to the breakdown of defense counsel and the intimidation of Petitioner to waive his appeal rights. U.S. v. Slone, 833 F.2d 595 (6th Cir. 1987). [The trial court unduly interferes with counsel's conduct of the case].

Clearly, the Petitioner was not convicted on the evidence presented, but on the trial court's personal bias, manipulation and overpowering of the jury when the Petitioner and his witnesses were testifying. Special Judge Shewmaker would roll his eyes and shake his head in disbelief, overpowering the jury by sending them a clear message that he did not believe the testimony and neither should the jury.

E. Petitioner was denied his due process rights to a fair trial by the cumulative effects of the proceeding errors, depriving him of his Fourteenth Amendment Rights to the United States Constitution.

Assuming that this Court declines to hold an individual previously assigned error sufficient to require the reversal of Petitioner's conviction, the cumulative effect of the preceding errors requires that the conviction be set aside. As a result of all errors, Petitioner's right to a fair trial was subverted and due process denied. The errors previously cited (hereby incorporated in this argument) kept Petitioner's conviction from being established in accordance with the procedures demanded by the Constitution. It is a long established authority in this Court that an accumulation of

concurrent errors may authorize a reversal where no one error taken alone would justify a reversal.

Insisting that the requirements of "Fundamental Fairness" must be observed in all criminal trials, this Court held in Chessman v. Teets, 354 U.S. 156, 77 S.Ct. 1127, Il. Ed 2d 1253 1953: ...on many occasions, this Court has found it necessary to say that the requirements of the due process clause of the Fourteenth Amendment must be respected, no matter how heinous the crime in question...ID 775 S.Ct. 1132. Accordingly, on the basis of the cumulative effect of the assigned errors, this court is urged to reverse Appellant's conviction and order a new trial."

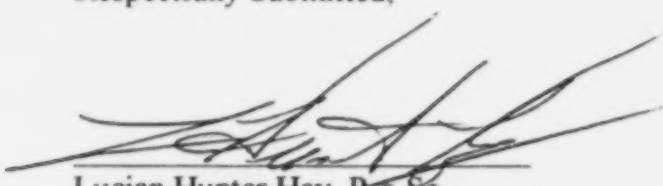
Petitioner states the cumulative effects of the outrageous conduct by the Prosecution, the personal bias by the trial court and the ineffective assistance of counsel violated Petitioner's constitutional right to a fair trial.

To allow the order of the Sixth Circuit Court of Appeals to remain would in effect insulate the trial counsel from review for his inadequate representation, the prosecutors misconduct to go unchallenged and the personal bias of the trial court to go unchecked. In addition, it would be contradictory not only to decisions of other circuits, but the Sixth Circuit itself and the law of the land as set by this high court. The Petitioner is innocent and has been framed for money and political power. Petitioner pleads with this court to hear his case so he can be released from his unconstitutional incarceration.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,



8-20-99
Date

Lucian Hunter Hay, ~~Pro Se~~
Petitioner
Prison No: 318-934
P.O. Box 511
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(614) 877-0036

Appendix A

No. 98-6733

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Lucian Hunter Hay,	)	
	)	
Petitioner-Appellant,	)	
	)	**ORDER**
v.	)	
	)	
Alan L. Lazaroff, Warden,	)	Filed June 7, 1999
	)	
Respondent-Appellee	)	Leonard Green, Clerk

Before: Martin, Chief Judge.

Lucian Hunter Hay, a pro se prisoner, appeals a district court order dismissing his petition for a writ of habeas corpus filed under 28 U.S.C. 2254. He moves for a certificate of appealability, pauper status, and appointed counsel.

Upon review, the court denies the application as to all issues. All pending motions are denied as well.

Entered by order of the court

s:/Leonard Green
Clerk

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

Eastern District of Kentucky

Jan. 20, 1999

At Frankfort
Leslie G. Whitmer
Clerk U.S. District Court

CIVIL ACTION NO. 98-15

LUCIAN HUNTER HAY, **PETITIONER**

V. **ORDER**

ALAN L. LAZAROFF, ET AL. **RESPONDENTS**

* * * * * *

Plaintiff has move the Court [Records Nos. 37-39] to allow him to proceed in forma pauperis with respect to his appeal, to issue a certificate of appealability, and for appointment of counsel. This matter is now ripe for decision.

Petitioner claims that he should receive counsel because it is clear that the state has violated his constitutional rights. The problem, however, is that petitioner waived his rights to appeal. Petitioner attempts to remedy his waiver by claiming that the state

breached his plea agreement, thereby voiding his pledge not to appeal.

The Petitioner, however, acknowledges on page 2 of his objections to the Magistrate's Report and Recommendation that he has already presented his breach of agreement argument to both the Kentucky Court of Appeals and the Kentucky Supreme Court without any success. In fact, the Kentucky Court of Appeals stated that the circuit court was correct in holding Petitioner to the agreement.[1] The Kentucky Court of Appeals and Kentucky Supreme Court's decisions to hold Petitioner to his contract is determinative.

Because petitioner has failed to make a substantial showing that he was denied a constitutional right, the Court will deny his motions. Accordingly,

IT IS ORDERED that Petitioner's motions for counsel, to proceed in forma pauperis, and for a certificate of appealability be, and the same hereby are, **DENIED.**

This the 20th day of January, 1999.

s:/Joseph M. Hood
JOSEPH M. HOOD, JUDGE

Date of Entry and Service:

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[1] It should also be noted that the record is void of any evidence that the state breached the agreement by prosecuting petitioner's wife in violation of his plea bargain.

Appendix C

Eastern District of Kentucky
Filed
Nov. 18, 1998
at Frankfort
Leslie G. Whitmer
Clerk, U.S. District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

Civil Action No. 98-15
Lucian Hunter Hay, **Petitioner**

v. **ORDER**

Alan L. Lazaroff, ET Al., **Respondents**

* * * * * * * *

This matter is before the Court on the Report and Recommendation of Magistrate Judge J. Gregory Wehrman [Record No. 30]. The petitioner has filed his objections [Record No. 34], and this matter is now ripe for decision.

Having considered de novo Magistrate Judge Wehrman's Report and Recommendation, the Court finds that petitioner's request for relief under 28 U.S.C. 2254 is without merit and will adopt the Magistrate's Report and Recommendation as its own opinion. Petitioner has presented no new or novel issues, and thus, a certificate of appealability is not warranted.

Accordingly,

It is ordered:

(1) That the Report and Recommendation [Record No. 30] be, and the same hereby is, **ACCEPTED**

Appendix C

(2) That Petitioner's objections be, and the same hereby are, **OVERRULED;**

(3) That Petitioner's motion for federal habeas corpus relief be, and the same hereby is, **DENIED;**

(4) That an issuance of a certificate of appealability be, and the same hereby is, **DENIED.**

s:/_____
Joseph M. Hood, Judge

Date of Entry and Service:

Notice is hereby given of the
entry of this order or judgment
on 11-19-98
Leslie Whitmer, Clerk
by: s:/C. Dearborn D.C.

Appendix D

Supreme Court of Kentucky
97-SC-96-D
(95-CA-1260, 2865, 2866, & 2867-MR)

Lucian H. Hay **Movant**

Franklin Circuit Court
94-CR-178 & 186

v.

Commonwealth of Kentucky **Respondent**

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED June 11, 1997

s:/ Robert F. Stephens
Chief Justice

Appendix E

COMMONWEALTH OF KENTUCKY

SUPREME COURT

95-CA-1260-MR
95-CA-2865-MR
95-CA-2866-MR
95-CA-2867-MR

Received
Feb. 07, 1997
Clerk
Supreme Court

Lucian H. Hay — Movant

vs.

Commonwealth of Kentucky — Respondent

MOTION FOR DISCRETIONARY REVIEW

ACTION NO. 95-CR-186
94-CR-178

Now comes the Movant, Lucian Hunter Hay, Pro Se, who is without the services of Counsel and acting as Counsel on his own behalf, requests this Honorable Court for a Discretionary Review pursuant to CR76.20.

The Movant, Lucian Hunter Hay, #318934, Orient Correctional Institute, 2E-129, P.O. Box 511, Columbus,Ohio 43216.

Appendix E

The Respondent is the Commonwealth of Kentucky, Attorney General's Appellant Division, P.O. Box 2000, Frankfort, Ky. 40602-2000. Gregory C. Fuchs, Asst. Attorney General.

On October 23, 1996, the Court of Appeals ruled that Movant could not appeal his conviction, as Movant waived his right to appeal. Movant filed a Pro Se Motion for Reconsideration and Modification on **November 11, 1996.** On January 16, 1997 the Court of Appeals denied said motion.

There is no bond pending as the Movant is being held in the Ohio Prison System at the request of the Kentucky Corrections Department.

MATERIAL FACTS

The Movant was the elected Jailer of Franklin County, Kentucky. I was convicted of multiple counts of sex offenses on August 17, 1995. After the verdict, Defense Counsel approached the Special Prosecutor, Joseph Guttman, without the Movant's knowledge. He stated to the Prosecutor that he could get me to resign from office and give up my right to appeal if the Commonwealth would agree to recommend a maximum sentence of ten years and reduce my wife's felony indictment to a misdemeanor. I was in a state of total state of shock from the conviction. I was told by Counsel that I would only serve five years and be paroled and I should take the deal. I refused. I stated I wanted to appeal, as the entire case was fabricated. Counsel Max Smith stated the following:

1. "The Judge has it in for you and you know it!!!"
2. "He will sentence you to 140 years TODAY and you will serve five years at least before you get your appeal, if you get one at all!!!"
3. "When and if you get your appeal you will get the

same Judge, who has it in for you and he'll make sure you're convicted again, just as he did this time!!!.

I stated again I wanted to APPEAL.

4. He (Counsel) then yelled. "you'll be in prison and the Judge will make sure your wife is convicted on her charge too! Your kids won't have any parents to raise them. Is that what you want?"

5. "If you don't agree before we go out there for sentencing, he'll withdraw the deal and both you and your wife will loose your kids!"

We now know this was all a LIE, but at the time, I was so confused, I felt I had no choice, but to go before the Court and waive my right to appeal for the Commonwealth's recommendation of ten years and dropping my wife's charges to a misdemeanor and, of course, my resignation from office. Less than 48 hours later I came to my senses. I notified my Counsel that I wanted my right to appeal, as the Prosecutor had obtained the conviction with known perjured testimony, fabricated evidence and the withholding of key evidence. The Court refused to allow me to regain my right to appeal. My attorney stated that if I continued to fight for my appeal he would withdraw from my case. Counsel notified the Court he would withdraw. We now know why my attorney was acting so bazaar; why he would tell his client to waive his appeal rights, which no attorney in his right mind would do!! We have just discovered a copy of a letter that Defense Counsel, Max Smith, sent to the Court on August 9, 1995, with a copy to Joseph Guttman, claiming that his doctor stated he could not take the stress of the upcoming trial. Had Movant been informed of the filing of said Motion, Movant would have never gone to trial with a Defense

Appendix E

Counsel who was stating he was suffering from mental illness. The court and the Prosecutor knew of this instability and the Prosecutor took obvious advantage of this by having Defense Counsel coerce Movant to waive his appeal rights.

After Defense Counsel notified the Court he would withdraw, I filed a Pro Se 60.02 Motion based on newly discovered evidence and Prosecutor misconduct. The new evidence proves that the witnesses committed perjury and that the Prosecutor knew it and encouraged it. A Prosecution witness, Rodney Brooks, has stated that Special Prosecutor, Joseph Guttman, asked him to commit perjury to bolster his fabricated case, based on the fact that the entire case was based on believable testimony of the witnesses, as there was no other evidence presented. The Trial Court stated, "this is a basic swearing contest between the alleged perpetrator and alleged victim's." It is clear, my right to a fair trial was violated.

On October 13, 1995, the Trial Court dismissed the 60.02 Motion without a hearing and sentenced me to ten years. I filed an appeal of my conviction and of the order of the Court denying my Motion to allow me to appeal. On October 26, 1995, I was transferred to the Ohio Prison System by the Kentucky Department of Corrections.

The Prosecutor then scheduled my wife for trial, for her felony indictment that the Commonwealth had agreed to drop to a misdemeanor, which was one of the main parts of the agreement that the Trial Court was holding me to, but not the Commonwealth. She was forced to pay an attorney $15,000, up front, to take the case. The trial date has been changed several times. It is now set for June, 1997. This is clearing a breach of the agreement as stated in Santobello vs. New York 92 SCT 495, U.S. vs. Cates 952 F 2d 149.

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"When the Prosecutor breaches it's promise with respect to an executed plea agreement, the Defendant plead guilty on a false premise and hence, his conviction cannot stand." U.S. vs. Borders 992 F2 563, "a guilty plea if induced by promise or threat which deprives it of the character of a voluntary act is **VOID**." Thus, the agreement not to appeal has been breached by the Commonwealth, by his continued prosecution of my wife, which makes the agreement null and void. Thus, the Appeal Court errored by not allowing me to appeal, U.S. vs. Coleman 895 F 2d 501, "due process requires that any ambiguity be construed against the Government." I never plead guilty. I have always professed my innocence. The whole case was trumped up against me to remove me from office. The newly discovered "tape recordings" prove that.

Paul J. Neel, Jr., Attorney at Law, from Louisville, Kentucky, was appointed to file the appeal. He filed the Appeal of the conviction, but not of the Judge's ruling of not allowing me to appeal, which was the most important point.

On August 26, 1996, Asst. Attorney, Fuch's filed his Motion to dismiss my appeal based on my waiver of my appeal rights. Counsel for Movant, Paul Neel, Jr., **failed** to respond to that Motion, as he had told me he would. Because of his failure to respond in any fashion, the Court of Appeals found for the Commonwealth and dismissed my Appeal on October 23, 1996. Counsel, Paul Neel, Jr., notified me of their decision and stated that ended his involvement in my case.

On November 11, 1996, I filed a Pro Se Motion for Modification and Reconsideration based on the fact that points of law were not addressed by appointed Counsel and that he withdrew and refused to file a Modification.

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On January 16, 1997, the Court of Appeals denied my Pro Se Motion for Reconsideration and Modification. It is from their ruling that I knowingly and voluntarily and intelligently gave up my right to appeal that I ask for discretionary review.

QUESTIONS OF LAW

1. The Movant had ineffective assistance of appointed Counsel because he failed to appeal or even address the issue of the Waiver of the Appeal Rights that Movant filed with his appeal. The Waiver was not knowingly and voluntarily given. The Court in Gray vs. Green 778 Fed 2d 350 (7th. Cir., 1985) held (1) "If Appellant Counsel has failed to raise a significant and obvious issue (failure could be viewed as deficient performance)' and (2) "if [the] issue not raised may have resulted in reversal of conviction or an order for new trial, the failure was prejudicial."

2. Had appointed Counsel not been ineffective and drafted a proper appeal of the Court Order not allowing Movant to regain his appeal right, appeal would have most certainly been granted, as the case law in this incident is overwhelming in Movant's favor. In U.S. vs. Streater 70 F 3d 1314 (DC Cir. 1995) at 1318, "There is a reasonable probability that but for Counsel's errors, he would not have plead guilty and would have insisted on going to trial."
Or in Movant's case, would have been sentenced by the Jury and appealed. Citing Strickland vs. Washington 104 SCT 2052, Voluntary and Intelligent nature of a guilty plea on sixth amendment grounds. Also, see Hill vs. Lockhart 106 SCT 366. Had it not been for Movant's trial Counsel's faulty legal advice and coercion, Movant would not have even considered waiving his right to appeal. In light of the newly discovered letter of Defense Counsel, who was suffering from mental illness, Movant would have never gone to trial with Counsel. In U.S. vs. Anderson 993 F 2d 1435 (9th Cir. 1993). In considering issue of voluntariness of

guilty plea, reviewing Court must examine **totality** of circumstances surrounding plea. The Appeals Court was unable to examine the totality of the circumstances surrounding the agreement because Appellants Counsel was ineffective and failed to brief that appeal. Thus, the Appeals Court made their decision to deny my appeal based on the Motion filed by the Commonwealth **only** and not the totality of the circumstances.

JUDICIAL MISCONDUCT

In Anderson 993 F. 2d 1435, finding of Judicial misconduct in connection with guilty plea proceeding constitutes plain error and entitles Defendant to withdraw guilty plea even if error is identified for the first time on appeal. "District Judge imposed unreasonable constraints on Defendant decision making process which rendered Defendant's guilty plea involuntary." In the case at bar, the total bias shown by the Trial Court from our first hearing to the end of all proceedings constitutes unreasonable constraints on Movant's decision making process.

1. The court refused to grant new Counsel a continuance to prepare for trial leaving him less than two weeks to prepare for a complex multiple count indictment. In U.S. vs Anderson 993 F 2d 1435 at 1438, "The Court's refusal to grant a continuance to Anderson's newly appointed Counsel to prepare for what would appear to be at least a moderately complicated trial, contributed to the coercive atmosphere.

2. Refusing two requests to recuse himself when it became obvious the Judge was totally biased in the case. Ward vs. Village of Monroeville, 409 U.S. 57, 93 SCT 80 - Connaly vs. Georgia 97 SCT 546.

Appendix E

3. The Court chastised Movant in open court that he switched attorneys just to drag out the case. We now know, in fact, the Court had contacted William E. Johnson, who had withdrawn as Counsel and knew full well the reason for the withdrawal. Thus, he falsely accused and chastised Movant in open Court intimidating new Counsel and Movant. There is much more contained in the appeal brief of the conviction that the Appeals Court refused to consider, as they stated I had given up my appeal right. Boykin 89 SCT 1712, the Trial Court's determination of voluntariness must consider that ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover up of unconstitutionality. The intimidation of Defense Counsel and Movant by the Trial Court made Trial Counsel ineffective during the proceeding and caused him to make the statements that he made to Movant to coerce him to waive his appeal rights, especially in light of his now known mental illness.

TRIAL COURT'S VIOLATION OF STATUTE

The Trial Court errored in it's procedure in not allowing the Jury to sentence the Movant first before entering into any agreement as the statute on sentencing clearly states that once a jury finds Defendant guilty it **must** then sentence the Defendant, therefore, the Trial Court overstepped it's bounds of authority and procedure that the Legislature had enacted.

If after the Jury had recommended it's sentence, the Trial Court would have been within it's power to reduce the sentence for an agreement not to appeal, but the Trial Court violated the Statute by entering into said agreement, thus the agreement is contrary to law, thus is null and void.

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PROSECUTOR MISCONDUCT

Misconduct by the Special Prosecutor, Joseph Guttman, lead to the agreement to waive appeal rights.

The Prosecutor obtained the convictions by the use of known perjured testimony and the withholding of key exculpatory evidence that proved that the witnesses committed perjury of material facts and they did it with the full knowledge, support and encouragement of Special Prosecutor, Joseph Guttman. Had the Prosecutor not obtained the conviction by this means, there would have been no agreement to appeal, as there would have been no conviction. This is best stated by Mooney 55 SCT at 342, "that requirement in safeguarding the liberty of the citizens against deprivation through the actions of the State, embodies the fundamental conception of Justice which lie at the base of our Civil and Political Institutions." Herbert vs. Louisiana 47 SCT 103, it is a requirement that cannot be deemed to be satisfied by the mere notice and hearing if a State has contrived a conviction through the pretense of a Trial which in truth is but used as a means of depriving a Defendant of Liberty through a deliberate deception of Court and Jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a Defendant is inconsistent with the rudimentary demands of Justice as is the obtaining of a like result by intimidation."

Evidence discovered after the conviction proves that the witnesses committed perjury and the Prosecution knew it, but is hiding behind the Waiver of Appeal. This was covered by the Pro Se 60.02 Motion filed in October, 1995. Recently, tape recordings clearly prove that this whole case and indeed the entire investigation was "sham".

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According to sworn depositions, these tape recordings of conversations of the witnesses were given to the State Police and the Prosecutor by the witness who taped them. The Prosecution then withheld these tapes from the Defense when we had in fact asked for and were told we had received all the tapes in our discovery. The discovery of these tapes clearly show the Prosecution and the State Police lied to the Defense and the Court. These tapes that have been withheld by the Commonwealth since 1994, clearly shows a conspiracy between the witnesses to fabricate the entire case against me, which lead not only to the unlawful conviction of Movant in this case, but also in the first trial of Movant where he was convicted on three misdemeanor counts, which are part of this appeal. Clearly the Prosecution and the State Police investigators knew that these tapes would have destroyed his entire fabricated case. Thus, he knowingly withheld them. The tapes prove the Prosecutor knowingly had the witnesses and plaintiffs commit perjury. Walker vs. Lockart 763 F 2d 942, 95, 959 (8th Circuit, 1985), due process violated when State failed to disclose for over twenty years transcripts of tape recordings in which person other than Defendant...despite sweeping general requests and Court order to disclose. In Miller vs. Angliker 848 F 2d 1312 (2d Cir) Cert, denied 448 US 890 (1988) the Court stated that the Brady Doctrine would also apply to guilty pleas when the plea is affected by the Governments non-disclosure of evidence. See White vs. U.S. 858 F 2d 416, 423-24 (8th Cir. 1988) Court assumed, without deciding, that Brady applies to guilty pleas. Cert. denied 489 US 1029 (1989).

In U.S. vs. Agurs 96 SCT 2392, 2397, "the undisclosed evidence demonstrates that the Prosecutions case included perjured testimony and that the Prosecution knew or should have known of the perjury. In a series of subsequent cases, the Court has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if

there is any reasonable likelihood that the false testimony could have affected the judgment of the Jury."

Not only did this affect the judgment of the Jury, but that of the Movant. The Movant has incorporated his letter to the Kentucky Attorney General in this Motion to list the misconduct by the Prosecutor and his total corruption of the truth seeking process.

In U.S. vs. Helmandollar 852 F 2d 498 at 501...This ends justify the means approach is wholly contrary to the duty of the United States Prosecutor and analogously to agent of the United States Government to act with the utmost probity and uprightness in the classic statement of the subject by Justice Surtherland.

The U.S. Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as it's obligation to govern at all: and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that Justice shall be done. As much as he is in a peculiar and very definite sense the servant of the law the twofold aim of which is the guilty shall not escape or innocence suffer. He may prosecute with earnestness and vigor indeed, he should do so, but while he may strike hard blows he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. Berger vs. U.S. 55 SCT 629, 633: the same consideration applies to law enforcement officers.

It is clear by the totality of the evidence that the Movant did not enter into the agreement voluntarily or knowingly or intelligently. In fact, he was coerced from the very beginning. The Movant's Trial Counsel withdrew just before the Trial. Movant is forced to find new Counsel. The Trial Court then chastises Movant in open

court for switching attorneys for no other reason but to drag out the case, stating that "people in Hell want water, too." The Court then forced Movant to Trial with just two weeks to prepare. The Prosecutor used known fabricated evidence and perjured testimony to obtain the conviction. This is now proven by the tape recordings that the State Police and the Prosecutor withheld from the Defense and the Jury.

After the conviction, trial Counsel's faulty legal advice and the sheer terror of being convicted for crimes you know you didn't commit all lead to the coerced agreement. As stated in U.S. vs. Anderson, the totality of the circumstances must be examined. This was impossible for the Court of Appeals as the Appellant Counsel failed to brief the Appeal.

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CONCLUSION

Movant should have another Counsel appointed so that this issue may be properly briefed for review and/or the case should be overturned and a new trial ordered with a new Judge appointed to hear the case.

There are no other Motions pending before the Court of Appeals on this case by either party.

The Movant prays this Honorable Court would grant his motion for Discretionary Review.

Respectfully Submitted,

s:/ Lucian Hunter Hay
Lucian Hunter Hay, 318934
Orient Correctional Institution
7E-450
P.O. Box 511
Columbus, Ohio 43216

2-3-97
Date

Appendix F

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

95-CA-2865-MR AND 95-CA-2866-MR AND 95-CA-2867-MR

Lucian Hunter Hay **Appellant**

Appeal from Franklin Circuit Court
Action No. 94-CR-186

v.

Commonwealth of Kentucky **Appellee**

* * * * *

ORDER

Before: Gardner, Gudgel and Guidugli, Judges

This Court, having considered the motion of counsel to withdraw, ORDERS that the motion be GRANTED. Attorney Paul Neel is permitted to withdraw, and appellant is now proceeding pro se.

The Court, having considered the appellant's pro se motion to file the motion to reconsider late and being otherwise sufficiently advised, ORDERS that this motion be GRANTED and the motion to reconsider be FILED as of the date of this order.

Appendix F

Finally, having considered appellant's motion to reconsider dismissal of the action, the Court ORDERS that the motion to reconsider be, and it is hereby, DENIED.

Entered: January 17, 1997

s:/ Paul D. Gudgel
Judge, Court of Appeals

Appendix G

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

Lucian Hunter Hay — Appellant

vs.

Commonwealth of Kentucky — Appellee

CASE NO:

MOTION FOR LEAVE FOR ENLARGEMENT OF TIME TO FILE MOTION FOR RECONSIDERATION AND MOTION FOR REHEARING, RECONSIDERATION AND MODIFICATION

Now comes the Appellant, Lucian Hunter Hay, who is without the services of an attorney and acting as attorney in his own behalf, requests leave of this Honorable Court for an Enlargement of Time pursuant to Civil Rule 6.02 and 76.40 to file for Reconsideration, Rehearing and Modification of this Court's decision entered October 23, 1996 denying his appeal pursuant to Civil Rule 76-38 (2) and 76.32 for the following reasons:

1. Appointed Counsel withdrew from Appellant's case on October 25, 1996, 2 days after the Court filed its decision.

2. Appointed Counsel mailed the Courts decision and letter notifying Appellant of appointed Counsel's termination of representation of Appellant to the Appellant's old address at Madison Correctional Institute, resulting in Appellant not receiving

said notification until November 5, 1996, 13 days after the entry of this Court's decision. Counsel had been corresponding with Appellant at his current address for the last 5 months, but for some reason mailed this to the old address.

3. With the withdrawal of appointed Counsel on November 5, 1996, Appellant was unable to file for Reconsideration and Modification in a timely fashion..

4. For the reasons stated, this should be looked upon as excusable neglect as stated in CR 6.02 (b), The Court for cause shown...order the period enlarged... upon motion made after the expiration of the time specified period permit the act to be done where the failure to act was the result of excusable neglect.

If Appellant is granted the Enlargement of Time, the Appellant will show a large amount of evidence that appointed Counsel was given by Appellant and neglected to provide to this Honorable Court, which this Court will see that Appellant had ineffective assistance of Appellant's Counsel. As stated in CR 76.32 (b) Justice demands it, as the Attorney General's Office mislead this Honorable Court.

Appellant states the following reasons for Reconsideration, Rehearing and Modification pursuant to CR 76.32 1(1) (2) (3)

1. Appointed Appellant Counsel gave ineffective assistance to Appellant when he failed to present the following information to the Court for it's consideration.

A. Failed to state that the so called agreement was obtained by fraud. The case law is clear that any agreement that was entered into that was obtained by fraud it shall be set aside.

a. The Prosecutor and the State Police knowingly withheld exculpatory evidence from the Defendant/Appellant, Lucian Hunter Hay and his Counsel that

would have changed the outcome of the Trial and the Defendant would have been found not guilty. The Prosecutor knowingly withheld a tape recording it had of a conversation between Plaintiff Witness Jennifer Vest, Witness Evin Evins and Franklin County Judge Executive, Bob Arnold. The tape clearly shows that these three conspired to fabricate charges against Defendant/Appellant because Appellant was taking adverse job action against them. Jennifer Vest clearly states, "I'll tell you what, if Hunter interferes with my job, I will nail him one way or the other." County Judge Bob Arnold clearly encourages her and says, "Well, honey, that's what you have to do." This tape that was withheld clearly is very damaging to the Commonwealth's case, so the Special Prosecutor, Joseph Guttman withheld it changing the outcome of the trial.

2. The Prosecutor withheld another tape from the Defendant/Appellant, that shows Plaintiff Vest told her live in boyfriend, State Trooper Gerald Wilson, that she planned to join in with Evin Evins in his lawsuit against the Defendant/appellant. He never reported to anyone of the alleged crimes she later said Appellant perpetrated. Had she told him, he would, as a State Trooper been required to act. He did not. Defendant Vest testified at trial that she never told her live in boyfriend. But the tape withheld by the Prosecutor clearly shows in her own words that she did tell him and he thought nothing of it. Obviously, what she told him the Defendant did was not a crime. This was an extremely important piece of evidence that would have changed the outcome of the trial. So the Prosecutor deliberately withheld it in order to get his conviction..

3. The Prosecutor knowingly had three of the witnesses commit perjury on a material fact in the trial when he had them testify they were at work that day. The Prosecutor, it was later discovered after the trial, had in his possession the Employee Break Logs that clearly shows that these people committed perjury and

did so at his request. He knowingly withheld this document from the Defendant/Appellant. In fact, the Prosecutor, to this date, has refused to turn over a copy of that document which is public record. He is clearly obstructing Justice. This document would have clearly changed the outcome of the trial, that is why he failed to produce it and continues to withhold it from the Defendant/Appellant to this very day!!!

4. Appellant was forced to trial so fast that he was unable to discover some of this evidence. The fact that the Prosecutor, to this day, is withholding evidence and the continuance asked for and denied by Judge Shoemaker was critical in the Appellant not getting a fair trail and his conviction was totally obtained by fraud.

5. Evidence has now been obtained in these tape recordings, knowingly withheld by the Prosecutor, stating that additional tapes exist with other witnesses. Those tapes, to date, have not surfaced. Appellant armed with the knowledge that the Prosecutor withheld the now known tapes, one can only conclude that he also continues to withhold additional exculpatory evidence that would totally exonerate Defendant/Appellant. But he continues to withhold them to maintain the conviction he obtained by fraud. Cannons clearly states that, the Prosecutor is bound by the oath and ethics of his office (Cannon DR7-103 (B) a public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to Counsel for the Defendant or to the Defendant, if he has no counsel, of the existence of evidence known to the Prosecutor or other Government lawyer that tends to negate the guilt of the accused, mitigate the degree of the offense or reduce the punishment.

Appendix G

Comment
DR 7 - 103

EC 7 - 13, EC 7 - 14 and DR 7 - 103 set forth the special ethical duties of the public prosecutor who has an obligation not merely to convict but to seek justice (EC 7 - 13). EC 7 - 13 gives grounds for imposing these special ethical obligations. EC 78 - 14, somewhat broad, prohibits the government lawyer from engaging in obviously unfair litigation and from using governmental power merely to harass private parties or to bring about unjust results. The Prosecutor was and is bound by Cannons to produce to this court the evidence he and the State Police have withheld, covered up and manipulated. Thus, the entire case was wrote with fraud!!!

6. The Prosecutor at the end of the trial quickly took advantage of the Defendant/Appellant, who was in a total state of shock at this conviction, a conviction that the Prosecutor obtained by fraud, perjury and the withholding of exculpatory evidence. The Defendant Appellant did not know or have any idea what he was agreeing too.

7. A Psychologist at the Jefferson County Jail stated when interviewing Defendant/Appellant that he had no idea what had happened to him. She obviously recognized his trauma and state of shock, as she ordered Defendant/Appellant placed on a constant and direct supervision for fear of his mental state. Thus, the Defendant/Appellant could not have knowingly and voluntarily entered into said agreement.

8. The Attorney General's Office totally mislead this Honorable Court when they stated in their Motion to dismiss that Defendant/Appellant waited a month to request to withdraw from the agreement. The Defendant/Appellant gave notice to the

Commonwealth and his attorney within 48 hours of his conviction, when he came to his senses. The Prosecutor clearly states in a newspaper interview that he had "no problem with the withdrawal of the agreement," as stated in the Frankfort State Journal.

9. The Prosecutor then proceeds to carry out his plan (part of the agreement was that the Prosecutor would not prosecute Defendant's wife). He instead, in violation of the agreement, prosecuted Defendant's wife. Thus, the Prosecutor violated the agreement making the entire agreement null and void. However, the Attorney General's Office deliberately mislead this Court by again withholding that information from this Court, in an ongoing attitude of Obstruction of Justice in this case.

Santobello vs. New York, 92 SCT 495, 404 US 257: The Court held that if the Prosecutor reneged on his part of the agreement, Appellant cannot be held to agreement.

The Appellant would further state that other tape recordings have surfaced that show that the State Police who investigated this case were close personal friends with Witness Jennifer Vest and her live in boyfriend, State Trooper Gerald Wilson. Prior to Appellant's trial, Trooper Gerald Wilson was promoted to work in the Special Investigations unit. The very unit that his close personal friends worked who conducted the investigation of this case. Such an unprofessional conflict of interest can not be allowed to stand, as there could not have been an objective and fair investigation of the evidence. Instead, the evidence was manipulated to fit their agenda. Additional tape recordings of conversations between the State Police and the Witnesses that were all secretly taped by Plaintiff Witness Evin Evins clearly shows the entanglement and friendship in the case by the State Police and the Witnesses, when in a phone conversation between Witness Evin Evins and lead Detective, Mark Stapleton, Stapleton states he is presently

interviewing Jennifer Vest and he is "just going to give her a gun and a badge and let her type the case report." Evins' response was, "me too! me too! Give me one too, we make a good team." Then they both laugh. The State Police withheld their taped interview of Jennifer Vest. It was never received by Defendant, obviously because it had highly incriminating evidence on it, some of which is heard on this taped conversation. In another taped conversation between Evin Evins and Terry Smither, Evins and Smither are talking about a potential witness by the name of Louis Weber who had just recently gone to work for the Kentucky State Police as a Trooper. Evins tells Smithers that the State Police say don't worry about Louis, because he is one of them now and he'll say the right thing. Obviously, the detectives thought that just because Louis Weber was a state trooper he would now lie for them in order to get a conviction. However, Louis Weber refused to be manipulated into lying and they did not use him in the trial. But this just shows the "business as usual" of obstruction of justice, fraud, perjury, manipulation of evidence, withholding of evidence of the Kentucky State Police and the Prosecutor in this case.

A prosecution witness by the name of Rodney Brooks has stated that the Prosecutor, Joseph Guttman, sat him down just before he testified and tied to get him to commit perjury. He refused. The Prosecutor pressed him harder to lie. He refused. Mr. Brooks has said that two of the Plaintiff's witnesses were present at this time, Donna Graham and Evin Evins. Both of them also encouraged him to commit perjury. Kercheval vs. United States, 274 US 220, 47 SCT 582, "This Court has recognized that unfairly obtained guilty plea in the Federal Courts ought to be vacated." Appellant further cites the following cases for the Court's consideration pursuant to CR 76.32 (1) (b), as it appears that the Court overlooked a material fact or a controlling statute or decision or has misconceived the

issues presented on the Appeal or the law applicable thereto. Because of ineffective assistance of Appellant's Counsel, the Court was not provided this information to consider in its decision not to allow Appellant to appeal.

U.S. vs. Anderson, 993 F2d 1435, to be valid, guilty plea must be voluntary and intelligent and cannot be the result of threats, misrepresentation or improper promises. In considering issues of voluntariness of guilty plea, reviewing court must examine **TOTALITY** circumstances surrounding plea. Also see US vs. Wagnes 996 F 2d 906.

Because appointed Appellant's Counsel did not provide this Court with any of the issues surrounding the agreement, the court should reconsider it's decision based on modification request. Stano vs. Dugger, 921 F 2d 1125, because guilty plea is equivalent to conviction, determination of voluntariness must consider ignorance, incomprehension, **coercion, terror, inducement or subtle or blatant threats** that might be cover up of unconstitutionality, USCA Constitution Amend 14. U.S. vs. Streater, 70 F 3d 1314, Defendant's guilty plea was not made knowingly or voluntarily where it was induced by Counsel's faulty legal advice. USCA 6 Amendment.

In analyzing constitutionality of guilty plea, reviewing court must determine that plea represents voluntary and intelligent choice among alternative courses of action open to Defendant.

Garrett vs. Jones, 3 F 3d 444
Johnes vs. White, 992 F 2d 1548
Mardis vs. Jones, 3 F, 444

Appendix G

At trial, Appellant had ineffective assistance of Counsel when Counsel told Defendant/Appellant, if he appealed it, it would take 5 years and the Judge (Shoemaker) who has it in for you, will throw you in prison today and you will pull 5 years just waiting on your appeal. If you do get a new trial, you will have the same judge and he'll make sure you are convicted again serving 140 years. He said you must decide right now because the Prosecutor is going to withdraw it if you don't agree right now.

10. The Defense/Appellant states that he has also discovered that in addition to the biases the Trial Court showed that Appellants Counsel stated in his brief that the Judge in this case was totally biased, as it has been learned that Judge Shoemaker was and is a good close personal friend of the adopted parents of the Defendant/Appellant's biological daughter, who was given up for adoption by the birth mother at birth. 23 years later she petitioned Judge Shoemaker to find her biological parents. She did so at the staunch resistance of Judge Shoemaker. He stated she "shouldn't have anything to do with them." Judge Shoemaker knowing that she had in fact become very close to Defendant/Appellant used his power in this case in insure the conviction of Defendant/Appellant in order to sever the ties that had formed between his close friends, the adopted parents of Defendant/Appellants biological daughter. This fact, coupled with the Prosecution's fraud, perjury and withholding evidence, this case has to go down as one of the most outrageous miscarriages of Justice of all time. We tried several times to have the Judge recuse himself, but he refused. Appellant would ask this Honorable Court to grant him a rehearing on his case. He would also like to ask for another Counsel be appointed to represent him in this, as his appointed Counsel ended his participation in this case, leaving Appellant to file this Motion on his own. Justice truly demands that Appellant be granted a new

trial because of the gross miscarriage of Justice placed on him. Appellant would ask for oral arguments to be heard in this case.

The Prosecutor and the Judge threatened the Appellant with 140 years in prison if he did not resign his Constitutional Office and give up his rights to appeal. This cannot be allowed to stand.

In the interest of Justice, the Appellant prays this Honorable Court will grant his Motion for Enlargement of Time for Discretionary Review.

Respectfully Submitted,

s:/Lucian Hunter Hay
Lucian Hunter Hay, 318934
Orient Correctional Institution
7E-450
P.O. Box 511
Columbus, Ohio 43216

11/11/96
Date

Appendix H

Commonwealth of Kentucky

Court of Appeals

No. 95-CA-2865-MR
No. 95-CA-2866-MR
No. 95-CA-2867-MR

Lucian Hunter Hay — Appellant

v. **Appeal from Franklin Circuit Court**
Action No. 94-CR-0186

Commonwealth of Kentucky — Appellee

* * * * *

ORDER

Before Knopf, Combs and Guidugli, Judges.

This Court, having considered the motion to dismiss and the response thereto, and being otherwise sufficiently advised, ORDERS that the motion be, and it is hereby, GRANTED, and this appeal is DISMISSED, it appearing to this Court that the circuit judge was very thorough in his questioning of the appellant concerning the plea bargain agreement and that the appellant clearly entered into it knowingly and voluntarily. The appellant waived his right to appeal and the circuit court was correct in holding the appellant t this agreement.

Appendix H

The appellee has filed a motion in the alternative for an extension of time to file a brief. This motion is DENIED as UNNECESSARY.

entered: Oct. 23, 1996

s:/ Knoph
Judge, Court of Appeals

Appendix I

RENDERED: August 28, 1998; 10:00a.m
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

97-CA-2460-MR

Adele Hay **Appellant**

v.

ON APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE STEPHEN M. SHEWMAKER,
SPECIAL JUDGE
ACTION NO. 94-CR-186

Commonwealth of Kentucky **Appellee**

OPINION
REVERSING
AND REMANDING

*** *** ***

Before: Dyche, Emberton, and Johnson, Judges.

DYCHE, Judge. Adele Hay appeals her conviction and sentence in Franklin Circuit Court for intimidating a witness (Kentucky Revised Statute [KRS] 524.040). We reverse and remand.

Appendix I

Adele Hay ("Adele"), William Morrison, Clarence Turner, and Hunter Hay (Adele's husband, hereinafter "Hunter") were indicted for intimidating Donna Graham, a witness against Hunter in his trial for sexual abuse and misconduct while he was the Franklin County Jailer. Hunter induced Morrison, at the time an inmate at the jail, to contact Graham regarding her testimony in Hunter's trial by inferring that Morrison would not receive work release unless he acted on Hunter's behalf. Adele was a secretary at the jail, and in charge of administering the jail's work release program. After Morrison agreed to contact Graham, Adele granted his work release application. Morrison was not approved for the job he had arranged, but rather for a job Adele arranged for him.

Morrison entered into a plea agreement on Friday, November 11, 1994, and was sentenced to a fixed term of days with credit for time served. Although approximately eighteen days remained on his sentence, he was mistakenly released from the jail that afternoon.[1] Later that evening he placed a series of telephone calls to Graham, threatening her with possible arrest and other trouble if she testified against Hunter. Graham reported the threats to the Kentucky State Police (KSP).

Morrison testified that he was taken to Adele's office on Friday, November 18, as two KSP detectives arrived at the jail to interview him; Adele denied this. Regardless, Morrison was interviewed the following day by the detectives. Morrison told Turner that he needed to talk to Hunter about the interview. Turner telephoned Hunter at home, but Hunter sent Adele to the jail. Adele, Morrison, and Turner discussed the KSP investigation

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[1] After he was notified of the mistake, Morrison reported back to the jail on Monday, November 14.

that afternoon, and Adele counseled Morrison to take the Fifth Amendment if asked to testify about the phone calls.

Adele was the last of the four co-defendants to be tried. Hunter was convicted of intimidating a witness, and several other felonies, including rape. Turner pled guilty to harassing a witness pursuant to North Carolina v. Alford, 400 U.S. 25, 915 S. Ct. 160, 27 L.Ed. 2d 162 (1970). Morrison pled guilty to intimidating a witness and was sentenced to one year on the recommendation of the Commonwealth after agreeing to testify in subsequent proceedings. A jury convicted Adele of intimidating a witness. She was sentenced to one year, probated for five years, and fined $500. Her probation was conditioned upon her having no contact with convicted felons, specifically Hunter.

Adele raises five issues on appeal: 1) there was no evidence presented that she planned or committed the offense of intimidating a witness; (2) her acts were inadmissible since they were unrelated to intimidating a witness; (3) Turner's Alford plea and Hunter's rape convictions were introduced in error; (4) the $500 fine was improperly imposed; and (5) the probation condition prohibiting her from contact with convicted felons is improper because it specifically prevents contact with her husband.

The first two assertions are factual questions from which a jury could draw reasonable inferences from the evidence as a whole, whether direct or circumstantial, and find appellant guilty. "Circumstantial evidence is sufficient to support a criminal conviction as long as the evidence taken as a whole shows that it was not clearly unreasonable for the jury to find guilty." Russell v. Commonwealth, Ky., 882 S.W. 2d 111, 114 (1994), cert. denied, 513 U.S. 1174 (1995) (citation omitted). A jury could reasonably infer from Adele's actions, including arranging Morrison's job,

approving his release, and traveling to the jail after his KSP interview to speak to him, that she was aware of and involved in the intimidation of Graham.

Appellant's third assignment of error is that Hunter's rape convictions and Turner's Alford plea were improperly admitted and unfairly prejudiced appellant. We agree that the evidence of Hunter's convictions was improperly admitted, but find no error in the admission of Turner's conviction.

Appellant argues that the trial judge erroneously permitted disclosure of Hunter's rape convictions under Kentucky Rules of Evidence (KRE) 403. She claims that introducing the specific nature of Hunter's crimes was improper and resulted in undue prejudice. The Commonwealth counters that the evidence was admissible to establish that Graham was a known potential witness in a judicial proceeding against Hunter, proving one of the key elements of intimidating a witness, and that the trial court properly limited use of the convictions by admonishing the jury.

KRE 403 prohibits relevant evidence from being admitted if introduction of the evidence is substantially outweighed by undue prejudice. KRE 404 (b) permits introduction of other crimes if the crimes are so interrelated with other evidence that separation of the two would result in serious adverse effect to the offering party. Appellant was indicted for intimidating a witness, one element of which requires showing that the intimidated individual is or might be a witness in any official proceeding. While it was necessary for the Commonwealth to inquire of Graham whether she was witness against Hunter, there was no reason to introduce the nature of those proceedings. The element could have been established simply by asking Graham if she was a witness in any official proceeding; the Commonwealth could have further inquired if she had been a

witness against Hunter, appellant's husband. But introducing the fact that the witness had been one of Hunter's rape victims merely served to inflame the passions of the jury, possibly causing it to unfairly impute Hunter's guilt onto his wife.

It is ordinarily assumed that a curative admonition to the jury will achieve its desired effect. Clay v. Commonwealth, Ky. Apo., 867 S.W. 2d 200, 204 (1993); see also Carpenter v. Commonwealth, Ky., 256 S.W. 2d 509 (1953). Here the jury was admonished after an objection by appellant; however, the Commonwealth continued to make repeated reference to Hunter's rape of Graham, and these references so poisoned the atmosphere that we are unable to maintain confidence in the jury's verdict. Allowing the Commonwealth to repeatedly make mention of the specific nature of Hunter's crimes was error, and it is on these grounds which we reverse.

The admission of Turner's Alford plea does not present the same difficulties. The Commonwealth concedes that admission of the Alford plea would be error under KRE 609, which does not allow a witness's credibility to be reflected upon by proof of a conviction unless the crime was punishable by death or imprisonment for one year or more under the law under which the witness was convicted. The Commonwealth argues that the evidence was admissible, however, under KRE 611 (b), which allows a "witness [to] be crossed -examined on any matter relevant to any issue in the case, including credibility. . . ." In the alternative, the Commonwealth argues that the evidence of Turner's conviction was admissible to show bias against the Commonwealth.

Appendix I

In addition to requiring that the prior conviction be either a felony or a capital offense, DRE 609 further provides that "[t]he identity of the crime upon which convictions was based may not be disclosed upon cross-examination unless the witness has denied the existence of the conviction." However, a witness's credibility may always be challenged under KRE 611 (b). After Turner denied knowing who Graham was, the evidence was offered to impeach his credibility by establishing that he had entered an Alford plea to harassing Graham, thus indicating that he did in fact have some knowledge of her. Other avenues may also be open for establishing such a relationship, such as employment histories or the testimony of mutual acquaintances. Nevertheless, the use of his Alford plea to harassing a witness was appropriate for this purpose.

Additionally, it was proper to use such evidence as proof of bias against the Commonwealth. In Commonwealth v. Cox, Ky., 837 S.W. 2d 898 (1992), defense counsel sought to impeach a witness for the prosecution by asking if he was on probation for a specific misdemeanor conviction in an effort to show bias. The Commonwealth objected to the question and the judge admonished the jury not to consider the question or the answer. The Court stated that because the evidence was introduced to show bias, rather than to impeach on the basis of the conviction, Commonwealth v. Richardson, Ky., 674 S.W. 2d 515 (1984) (prohibiting the identification of the prior offense to the jury where the witness had not denied the existence of the conviction), was not triggered. Therefore, the testimony was admissible, and the denial of cross-examination was subject to harmless error analysis. Cox, supra, at 901; see also Delaware v. Van Arsdall, 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). Here, it is unnecessary to conduct a harmless error analysis, because the witness was cross-examined in the presence of the jury. Because the evidence

was admitted to show a potential bias against the Commonwealth, there was no error.

Finally, we briefly address the sentence imposed by the trial court. Appellant argues that the court erred first by imposing a $500 fine, and second by conditioning her probation by prohibiting contact with her husband. We agree on both counts, but not necessarily in harmony with her arguments.

She contends the parties jointly agreed to forego jury sentencing for a one-year sentence; therefore, the trial judge could not deviate from this agreement and impose a fine. KRS 532.070. This statute permits trial judges to amend unduly harsh sentences for felony convictions. It is not applicable in this case, since a jury did not sentence Adele. The trial court, when sentencing a defendant to probation, may impose a fine. KRS 532.040. However, if an individual is convicted of a felony, the trial court is required to impose a fine between $1,000 and $10,000. KRS534.030 (1). In a felony case, the jury is required to impose a sentence provided by law, KRS 532.055 (2), and the sentences provided are limited to a term of years. KRS 532.020. Although the agreement reached between appellant and the Commonwealth as to her sentence has the same force as if it had been returned by the jury, the judge is still required to impose a fine. The court erred not in imposing the fine, but by imposing a fine not within the limits of KRS 534.030.

Appellant next argues that the condition of her probation barring contact with convicted felons, specifically her husband, was improper. She concedes that KRS 533.030 gives the trial court jurisdiction to set probation conditions, but contends that the trial court abused its discretion in imposing the "no contact" provision.

Appendix I

A trial court has wide discretion in setting conditions for a probationer, constrained only by the requirement that such conditions are "reasonably necessary to insure that the defendant will lead a law-abiding life. . . ." KRS 533.030 (1). This Court will not reverse a trial court's imposition of probation conditions absent abuse of discretion. Peoples v. Commonwealth, 313 Ky. 618, 622, 233, S.E.2d 265, 267 (1950).

However, marriage is a fundamental right. Loving v. Commonwealth of Virginia, 388 U.S. 1, 81 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967). The trial court's discretion should be more narrowly circumscribed in cases involving fundamental rights. See Dawson v. State, 894 P.2d 672, 680 (Alaska Ct. App. 1995); State v. Martin, 580 P.2d 536, 540 (Or. 1978). Therefore, before restricting access to a spouse as a condition of probation, the trial court should determine whether less restrictive alternatives are available to meet specific needs of the case at hand. While prohibiting spouses from contact during probation may be justified in certain situations, specific written findings must be entered indicating why such a restriction is necessary in light of the Commonwealth's interests in conditioning probation to rehabilitate the defendant. Should appellant be convicted upon retrial of this case, the trial court should keep these principles in mind during sentencing.

The judgment of the Franklin Circuit court is reversed, and this case is remanded for a new trial consistent with this opinion.

Emberton, Judge, Concurs.
Johnson, Judge, Dissents
Johnson, Judge, Dissenting. I respectfully dissent. I would reverse the conviction for complicity to intimidate a witness since I believe the court erred in not granting Adele's

motion for a judgment of acquittal. The Commonwealth failed to present sufficient evidence to support a conviction for complicity to intimidate a witness as required by KRS 502.020 (1) or (2).

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David J. Guarnieri
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Oral Argument for Appellant:

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